

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MELVIN HUEY DAVIS,  
  
Defendant and Appellant.

C058361  
  
(Super. Ct. No.  
07F08989)

Defendant Melvin Huey Davis entered a negotiated plea of no contest to unlawfully driving a motor vehicle (Veh. Code, § 10851, subd. (a)) and denied a prior strike allegation (Pen. Code, §§ 667, subds. (b)-(i); 1170.12)<sup>1</sup> with the understanding he would receive the middle term of two years in state prison, which would be doubled to four years if the trial court found

---

<sup>1</sup> Further undesignated statutory references are to the Penal Code.

the prior strike allegation true. It was further agreed that a remaining count would be dismissed.

The trial court found the prior strike allegation true, denied defendant's motion to dismiss it (§ 1385), and sentenced defendant to four years in state prison, with credit for 223 days (149 actual and 74 good conduct).

Defendant appeals, contending the trial court erroneously concluded that it could not consider the preliminary hearing transcript from the record of his prior conviction in determining whether (1) that conviction constituted a "serious felony" within the meaning of the three strikes law, and (2) his conduct in committing the prior offense placed him outside the spirit of the three strikes law. He asks us to remand the matter for a new sentencing hearing. We shall affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

##### A. Prior Conviction

In 1992, defendant pleaded no contest to first degree burglary (§§ 459, 460) in San Joaquin County case No. 54511 in exchange for a suspended two year prison sentence and dismissal of a remaining count for receiving stolen property (§ 496). The factual basis for the plea was "based on [the] prelim[inary hearing] transcript." According to that transcript, the victim left his home between 6:00 a.m. and 7:00 a.m., and when he returned that evening, his door was open and his television and radio were gone. At about 6:45 a.m. that same morning, a police officer observed defendant carrying a television and another man

carrying a radio in an alley around the corner from the victim's home. Defendant fled when pursued by officers. The victim later identified the television and radio carried by defendant and the other man as those taken from his home.

At the preliminary hearing on the prior conviction, defense counsel argued "there [wasn't] enough for a burglary . . . ." The trial court allowed that "it's a better case for the receiving stolen property," but noted its job was "to decide whether there is probable cause to believe that a crime was committed and a strong suspicion to suspect the defendant." The court found "reasonable and probable cause to believe that both the [c]ount [o]ne burglary and [c]ount [t]wo receiving stolen property were committed and probable cause to believe the defendant committed both of those felony violations."

#### B. The Present Case<sup>2</sup>

The information in the present case alleged in pertinent part that on December 22, 1992, defendant was convicted of first degree burglary in San Joaquin County case No. 54511 and that the conviction constituted "a serious felony" within the meaning of the three strikes law.

At the hearing on that allegation, the People submitted the following certified documents from the San Joaquin County Superior Court: an information filed September 23, 1992, alleging in count one that defendant "did willfully and

---

<sup>2</sup> The facts of the underlying offense are not relevant to the issues raised on appeal.

unlawfully enter [an] INHABITED DWELLING HOUSE . . . with the intent to commit larceny"; a minute order dated October 29, 1992, indicating defendant, with counsel, knowingly and voluntarily entered a plea of no contest to count one; and an abstract of judgment dated June 15, 1993, committing defendant to state prison for the offense of "BURGLARY 1ST DEGREE" and showing him convicted by his plea. The People also submitted certified records from the Department of Corrections reflecting that defendant was committed to state prison for a 1992 conviction in San Joaquin County for first degree burglary and certified copies of defendant's criminal history and a subsequent felony conviction.

Defense counsel submitted "the preliminary hearing transcript that's referenced as the factual basis for" defendant's 1992 no contest plea to first degree burglary and argued that it "fail[ed] to show entry, which is a necessary element to the first degree burglary" and that "the lack of entry . . . makes the factual basis insufficient and thus the strike insufficient."

The trial court observed that it "is not allowed to go behind the [plea] to allow a collateral attack on the basis for it" and found the prior conviction had been proved beyond a reasonable doubt.

Thereafter, defendant moved to dismiss the prior strike conviction, arguing the conduct in the present case -- driving a stolen vehicle -- was not serious, he had a drug addiction, he had "not suffered any conviction for a serious offense

. . . since the prior case," the prior conviction did not include violence or the threat of violence, the prior conviction was over 15 years old, defendant pled no contest to first degree residential burglary in the prior case to receive a suspended sentence and to participate in a drug treatment program, "[t]he law at the time [he] resolved his [prior] case required that [he] return on a new serious felony to require a five year enhancement," and "[w]hen coupled with the lesser evidence on the residential burglary, the court should not consider this prior to be one that should multiply any non-serious future offense . . . ." (§ 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) At the hearing on the motion, defendant told the court he "didn't do the burglary. . . . It was a [section] 496 [receiving stolen property]. It wasn't a burglary. That's why they could never place me in the dwelling. [¶] As far as . . . all the other things I'm guilty. But there's a reason behind it. They were all motivated by drugs by, addiction to narcotics."

The court denied the motion to dismiss the prior strike "in view of [defendant's] criminal history . . . ." While the court acknowledged that "the strike is remote," it noted that "[t]here was another [section] 496 which resulted in a misdemeanor conviction before this first degree burglary. That was also in Stockton. And it started out as a burglary, but ended up a [section] 496. But the prior conviction that has been alleged is in fact a first degree burglary. [¶] As far as [defendant's] criminal history is concerned, as [the prosecutor]

points out he's had the two separate prison commitments after 1992, one in 1996 and another one in 2001. [¶] The court also has to look at the parole violations which have occurred in 1994, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, and 2006. [¶] Drug addiction is a reason for the criminal behavior. But it's not a justification for it, nor is it an excuse."

#### DISCUSSION

##### A.

Defendant first contends the trial court violated his right to due process of law "when it ruled it was not permitted to consider the preliminary hearing transcript in determining the validity of the prior conviction allegation."

As a preliminary matter, the trial court did not rule that it could not consider the preliminary hearing transcript; rather, it found that to the extent defendant was attempting to use the transcript to show there was an inadequate factual basis for his plea, it was "not allowed to go behind the [plea] to allow a collateral attack on the basis for it."<sup>3</sup> The court was correct.

"The [t]hree [s]trikes law defines a strike as, among other things, 'any offense defined in subdivision (c) of [s]ection

---

<sup>3</sup> To the extent defendant suggests the trial court excluded the preliminary hearing transcript or refused to review it, he is mistaken. After admitting the preliminary hearing transcript and other exhibits into evidence, the trial court continued the hearing on the prior conviction so that it could review the various exhibits. When the hearing reconvened, the trial court indicated it had "read the exhibits . . . ."

1192.7 as a serious felony in this state.' (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).)" (*People v. Kelii* (1999) 21 Cal.4th 452, 456.) Section 1192.7, subdivision (c), lists some felonies that are per se serious felonies, such as murder, mayhem, rape, arson, robbery, kidnapping, and *burglary in the first degree*. (§ 1192.7, subds. (c)(1), (2), (3), (14), (18), (19), (20).) While a trial court "may look to the entire record of conviction" in determining whether a prior conviction is serious, where, as here, the prior conviction is among those enumerated in section 1192.7, subdivision (c) and the elements of the offense have not changed since the time of that conviction, no further inquiry is warranted. (*People v. Kelii*, *supra*, 21 Cal.4th at p. 456; §§ 459, 460.)

Defendant's assertion that "the factual basis underlying [his] prior conviction for burglary was ambiguous at best" constitutes an impermissible collateral attack on the validity of his 1992 conviction. (*People v. Allen* (1999) 21 Cal.4th 424, 429 & 442-443 [collateral challenges to prior convictions are limited to claims that the defendant was denied the assistance of counsel or that he was not given proper "*Boykin-Tahl*"<sup>4</sup> advisements in connection with a guilty plea.].)

The trial court did not err in concluding defendant's 1992 conviction for first degree burglary constituted a serious felony for purposes of the three strikes law.

---

<sup>4</sup> See *Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274] and *In re Tahl* (1969) 1 Cal.3d 122.

B.

Defendant next asserts the trial court "abused its discretion when it failed to dismiss [his] prior conviction because it misunderstood its ability to consider the preliminary hearing transcript in context with the . . . motion" to strike the prior conviction. As we shall explain, any error was harmless.

A trial court has the discretion to strike a prior serious felony conviction for purposes of sentencing only if the defendant falls outside the spirit of the three strikes law. (§ 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161.) In deciding whether to do so, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

We review a trial court's failure to strike a prior conviction under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.)

In *People v. Wallace* (2004) 33 Cal.4th 738, 754, our Supreme Court held that "the circumstance that a magistrate previously declined to hold defendant to answer on a charge after conducting a preliminary hearing was not a proper consideration in determining whether defendant fell outside the



spirit of the [t]hree [s]trikes scheme . . . .” In doing so, the court explicitly declined to state “whether a trial court properly may strike a prior conviction allegation in furtherance of justice under section 1385 based upon proof of factual innocence of the prior offense, and if so, what types of evidence the court may consider for this purpose.” (*Id.* at p. 754, fn. 3.) In his concurring opinion, cited by defendant, Justice Moreno observed that although “the mere facts that the magistrate declined to hold defendant to answer in one of the prior convictions to which defendant eventually pleaded guilty, and that the trial court set aside the charge . . . , do not by themselves justify the dismissal of the strike,” “nothing forbids a court from considering the insufficiency of the underlying evidence to determine whether the magistrate and the trial court were correct in their rulings, and in then dismissing a strike on that basis.” (*Id.* at p. 755 (conc. opn. of Moreno, J.).) “[T]he fact that there was insufficient evidence to hold a defendant to answer for an offense to which he eventually pleaded guilty has bearing on whether the defendant is in whole or in part outside the spirit of the [t]hree [s]trikes law.” (*Id.* at p. 756 (conc. opn. of Moreno, J.).)

Even assuming the trial court was permitted to consider the “evidence presented at [the] preliminary hearing relating to [the] prior conviction” in determining whether defendant was outside the spirit of the three strikes law, as defendant contends, any error in failing to do so here was harmless.

The evidence presented at the preliminary hearing set forth a sufficient factual basis for defendant's plea. Although no one saw defendant enter the victim's home, he was found with the victim's property around the corner from the victim's home no more than 45 minutes after it was taken; and he fled when pursued by police officers. Unlike the situation contemplated by Justice Moreno in his concurring opinion in *People v. Wallace, supra*, 33 Cal.4th at page 756, there was sufficient evidence to hold defendant to answer for the offense to which he eventually pleaded no contest. Accordingly, any failure by the trial court to consider the evidence presented at the preliminary hearing in determining whether to strike the prior strike conviction was harmless.

Defendant's assertion that "[t]he evidence proffered by the prosecution to prove the prior conviction failed to show [he] knowingly pled guilty to committing a serious felony in 1992" in that the minute order from the change of plea proceeding shows only that he "was generally advised the conviction could be used as a prior. . . . [a]nd the charges filed against [him] at that time did not refer to or otherwise allege the burglary charge qualified as a serious felony within the meaning of" the three strikes law constitutes an impermissible collateral attack on his prior conviction. As previously discussed, collateral challenges to prior convictions are limited to claims that the defendant was denied the assistance of counsel or that he was not given proper "*Boykin-Tahl*" advisements in connection with a guilty plea. (*People v. Allen, supra*, 21 Cal.4th at pp. 429 &

442-443.) *Boykin-Tahl* advisements concern the right to a jury trial, the right to confront the witnesses against him, and the right to be free from compelled self-incrimination, and thus, are not implicated here. (See *In re Tahl, supra*, 1 Cal.3d at p. 132.)

The trial court did not abuse its discretion in denying defendant's motion to dismiss the prior strike offense.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.